

***United States Court of Appeals  
for the Second Circuit***

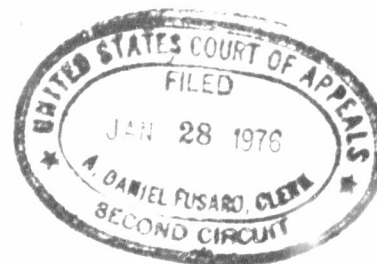


**PETITION FOR  
REHEARING  
EN BANC**



75-7128

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT



-----x  
JUAN SANCHEZ LUGO,

Appellant,

- against -

THE EMPLOYEES RETIREMENT FUND OF  
THE ILLUMINATION PRODUCTS  
INDUSTRY, et al.,

Appellees.  
-----x

75-7128

PETITION FOR REHEARING  
EN BANC

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PETITION FOR REHEARING  
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75-7128

JUAN SANCHEZ LUGO, appellant herein, by his attorney, DAVID S. PREMINGER, petitions this Court for rehearing pursuant to Rule 40 of the Federal Rules Appellate Procedure and Rule 6 of the general rules as follows:

1. David S. Preminger is an attorney duly admitted to practice law in the courts of the State of New York, and before this Court, has been appellant's (hereinafter plaintiff) counsel in this Court and the Court below, and is fully familiar with all the facts and proceedings pertinent hereto.

2. This petition is made because it is felt that the judgment in this case, entered on January 14, 1976, misconstrues certain facts with respect to plaintiff's claim that he was entitled to a hearing on his application for a disability pension. Plaintiff's claim of entitlement to a hearing is the sole issue for which plaintiff seeks rehearing.



3. The facts upon which this claim is based are set forth on pp. 4-5 and 9-10 of Appellant's brief in this case to which the Court's attention is respectfully referred.

4. In denying plaintiff's claim for a hearing, the Court set forth a number of factual contentions upon which it affirmed the opinion of the District Court. It is respectfully suggested that these contentions are in error. They are as follows:

(a) plaintiff submitted only two letters from his doctor in support of his application, neither of which stated he was disabled;

(b) plaintiff knew that he could submit additional material;

(c) a letter from the defendant's physician was before the District Court and indicated the procedures used in examining plaintiff and the test results;

(d) plaintiff offered no further medical proof in the District Court;

(e) plaintiff did not indicate what further evidence he might offer if granted a hearing;

(f) plaintiff did not request a personal appearance before the trustees; and

(g) plaintiff made no showing that more formal procedures might bring about a different result ((a) - (f)

are set forth on page 1553 of this Court's opinion, (g) is set forth on page 1554).

5. The basis for this petition rests on plaintiff's purpose in bringing this action. As was stated repeatedly in the District Court, plaintiff does not seek to involve the federal courts in a case-by-case review of pension plan denials of disability claims. Plaintiff did not seek to have his claim for disability pension reviewed on its merits (i.e., was plaintiff in fact disabled); indeed, federal jurisdiction under §302(e) of the Taft-Hartley Act, 29 U.S.C. §186(e), may not be available for such a purpose. Rather, plaintiff felt that he had been unfairly prevented by the defendants from proving his disability and therefore brought suit to challenge the procedures by which determinations are made.

6. The District Court, despite defendants' objections, ruled repeatedly that plaintiff's physical condition was not at issue (see, e.g., A-229-234\* [a copy of which is attached hereto as Exhibit "A"]).

MR. ROTHFELD: With respect to the hearing on the disability which plaintiff is asking for, the only thing that could happen -----

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\*All such references throughout this petition are to the Joint Appendix filed by the parties in this Court.



THE COURT: He's not asking exactly for the hearing. Are you asking for a hearing right now on disability?

MR. PREMINGER: No.

MR. ROTHFELD: For the hearing the trustees may provide...on disability.

THE COURT: Are you asking this Court to have a hearing?

MR. PREMINGER: Not on disability.

MR. ROTHFELD: I'm not saying that. I'm saying with respect to the hearing that the plaintiff is asking that the Court order the trustees -----

THE COURT: You're going to say if it is established that the plaintiff is not disabled, therefore, that ends the case.

MR. ROTHFELD: I've said that.

THE COURT: You've said that a thousand times. I haven't agreed. (A-238)

7. It is therefore clear that the District Court did not consider plaintiff's physical condition pertinent to the issue before this Court. In light of this ruling, it would not have availed the plaintiff (nor did the District Court so require or request) to offer any further medical proof of disability or make any showing of what further evidence he might have offered at a hearing. If this Court felt that such a showing was necessary, it is respectfully suggested that the proper procedure would have been to remand the matter to the District Court to

receive such evidence. If such a showing was not required (the District Court was of this opinion), then the failure to offer such evidence cannot suffice to deny plaintiff's claim.

8. With respect to the showing plaintiff made when he applied for a pension, it can hardly be said that its insufficiency in any way undermines the necessity for a hearing. Plaintiff is a middle-aged, Spanish-speaking, manual worker with a limited education. To assume that he was in any way cognizant of the burden upon him to establish his claim presumes a knowledge on his part of technical data which was, simply, beyond his scope.

Plaintiff applied for a disability pension because he was ill. He knew how he felt, that he was in pain, and that he was unable to perform his job. He, thus, applied for a pension and presumed that his rights would be protected. It is because he was not given an adequate opportunity to prove his claim that this action was commenced.

9. This Court also asserts that plaintiff did not request to appear before the trustees. Again, as stated in ¶8, supra., this presumes an awareness of technical procedures on the part of plaintiff which may not be presumed. Such a presumption works an even greater hardship on plaintiff since the defendant plan does not provide for a personal appearance. As such, it would seem



that any such request by plaintiff, even if he had thought to make it, would have fallen on deaf ears. It should be made clear that plaintiff did not retain counsel until all procedures with respect to his claim had been completed and the claim denied. There was, thus, no way for plaintiff to have known to proceed in any other manner.

10. Further, it is, by now, clear that hearings on the issue of disability are extremely useful for claimants. Social Security hearings are the best example. Decisions based on these hearings, to which a claimant of Social Security disability benefits has an absolute right, reverse prior denials of benefits of the Social Security Administration in great number (in general, see discovery in Martinez v. Weinberger, 73 Civ. 900, currently being litigated in E.D.N.Y., which indicates that there is an 80% reversal rate after Social Security hearings when claimants have been represented by counsel). It has been held repeatedly that there is great value not only in the hearing officer being able to make a first hand assessment of the claimant, but in the claimant's testimony with respect to his condition and how it affects his physical abilities. In this regard, as has been repeatedly recognized in this Circuit, a claimant's testimony, especially as to pain, is of great value. Cf. Ber v. Celebreeze,

332 F.2d 293 (2d Cir., 1964).

Thus, at a hearing, plaintiff, with counsel, could have produced new and more detailed medical reports (since he would now know that these were required), testified as to his own physical condition, - his ability to perform his old job, walk, stand, carry, push, lift, bend, etc., - and how it was adversely affected. Further, cross-examination of the defendants' physician could have been conducted with respect to the procedures used and the resultant findings. Plaintiff could, thus, have had a full and open opportunity to present his case in order that there be no question concerning the basis of his claim.

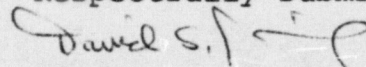
11. Finally, plaintiff's claim (as the District Court found, A-229-230 [see Exhibit A]) involves solely a question of law. It is a matter of extreme importance since, even if plaintiff were not at all disabled (though he is), even if he could adduce no further evidence at a hearing (which he can, see, e.g., certification of Social Security award attached hereto as Exhibit "B"), plaintiff's right to such a hearing would in no way be affected. That right, it is asserted, attached when plaintiff became a participant in a Taft-Hartley Pension Plan. Whether in fact, such a right exists was the issue before the District Court and the issue on appeal. To state that this specific



plaintiff is not entitled to a hearing because of the contended insufficiency of his claim ignores the substance of the claim itself -- that a federal statute, the Taft-Hartley Act, mandates fairness in the determination of these claims and that the appropriate sources for the definition of fairness are the Fifth and Fourteenth Amendments of the United States Constitution. Cf. Sturgill v. Lewis, 372 F.2d 400 (D.C. Cir., 1966). The Court's attention is again respectfully referred to Appellant's brief, pp. 8-14 (of which an additional seven copies are being filed herewith) for a full discussion of the importance of this matter.

WHEREFORE, appellant respectfully prays that this petition for rehearing en banc be granted.

Respectfully submitted,



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MR. PREMINGER: Your Honor, we have the complaint as to declaratory judgment that he will be entitled to retirement benefits.

THE COURT: You may not have any standing, Mr. Preminger, here at all. He's not entitled to them yet. I think that may be an issue as to whether this plaintiff has a right to bring any action at all.

Suppose he is not injured, suppose he is not disabled, Mr. Preminger? Has he got any standing?

MR. PREMINGER: With respect to which claim, your Honor.

THE COURT: Any claim.

MR. PREMINGER: If he is not disabled?

THE COURT: Yes.

MR. PREMINGER: Yes, your Honor.

THE COURT: What's the standing he has?

MR. PREMINGER: With respect to the claim for a hearing on the issue of disability, he is definitely entitled to the hearing once he puts in an application for a disability pension. He is a beneficiary --

THE COURT: Suppose he is absolutely well and



1  
2       ... just as readily as you can, put in a  
3       claim for disability, do you still think he has  
4       right to a hearing in this case? That's not the  
5       situation here but I would take the position --

6       THE COURT: That's a hypothetical question.

7       Well, then what you say in effect is the  
8       mere lack of due process in this trust pension fund  
9       is a structural defect in violation of Section 302C5  
10      of the Taft-Hartley Act; is that right?

11      MR. PREMINGER: That is correct.

12      THE COURT: That's really your main conten-  
13      tion, I suppose, not necessarily, but certainly  
14      not yet entitled to any retirement benefits.

15      MR. PREMINGER: No, we didn't make that  
16      claim, your Honor."

17      THE COURT: So, we have to assume his  
18      request is predicated upon the fact he is disabled  
19      and under the agreement he was not given due process  
20      and because he wasn't, somehow or other, this lack  
21      of due process violates the Taft-Hartley Act.

22      MR. ROTHFELD: Might I have a minute?

23      THE COURT: Yes.

24      MR. ROTHFELD: Assuming arguendo only  
25      that the trust agreement is violative of Section

33205 and that Mr. Tago was entitled to a hearing which we deny, nevertheless, if he in fact was not disabled, then the hearing would have been meaningless.

He would not have been entitled to one penny in disability pension fund payments.

THE COURT: Is this a class action?

MR. PREMINGER: No, it is not.

THE COURT: You didn't bring as such?

MR. PREMINGER: No, your Honor.

THE COURT: Go ahead.

MR. ROTHFELD: So that, your Honor, this Court is not spending valuable time to grant rights which don't mean anything under the circumstances.

Now, it is quite clear that if the plaintiff were deprived of a million rights, but nevertheless was not entitled to a disability pension, then the deprivation of those rights have not deprived him of one penny's worth that's coming to him and our position is, your Honor, that regardless of what the trust fund did and we complained -- we contend that it acted properly but if it did not, so long as the plaintiff was not disabled, he was not entitled to a disability pension and therefore,



1  
2 regarding of your Honor's argument concerning putting  
3 the court before the board, your Honor cannot give  
4 him the remedy he seeks which is a disability pension.

5 THE COURT: I don't think we have any  
6 authority to do that anyway. The only point involved  
7 is the declaratory judgment as to whether or not the  
8 agreement violated the Taft-Hartley Act and if it  
9 did, then I think one would say the duty would be  
10 upon the trustees, I suppose, to redraw it, so that  
11 it complied with the Taft-Hartley Act but as to  
12 my granting right then and there any specific  
13 judgment for Mr. Lugo, I don't think that's in the  
14 cards.

15 MR. ROTHFELD: If your Honor --

16 THE COURT: I haven't read the complaint  
17 recently. Do you ask for a judgment in favor of  
18 Mr. Lugo?

19 MR. PREMINGER: We don't, your Honor.

20 THE COURT: Speak louder.

21 MR. PREMINGER: All we are asking for at  
22 this point, your Honor, be he granted the hearing.

23 THE COURT: Not before me?

24 MR. PREMINGER: No.

THE COURT: Before the trustees, that's

all he's asking for.

MR. ROTHFELD: If your Honor --

THE COURT: I'm not going to give him in this court any disability pension one way or the other.

MR. ROTHFELD: Your Honor, I would like the opportunity to prove Mr. Lugo was not disabled and therefore, is not entitled to anything at all.

THE COURT: That brings up the question whether the cart comes before the horse or not. I want you to show me some reasonable nexus between the provisions which are attacked here in order for me to determine whether or not there's been a structural defect.

In other words, why is this 90 within ten years justified. Why don't you have a hearing, of provisions, which provide for an opportunity for the employee to make his position known.

I don't say that necessarily at this stage that you must have such a provision or I'll have to know the reason why. I don't say that even -- if I'm not satisfied with the reason, that I'm yet ready to say that the lack of due process here is a structural defect, but that is what this hearing this



1  
2 meeting is all about. I understand it's over  
3 respect to the 90 within 10 years. But's have  
4 something on that. But's not go back to where we  
5 were.

6 Are you ready?

7 MR. ROTHFELD: Might I have a moment?

8 THE COURT: Yes.

9 MR. ROTHFELD: If your Honor would please go  
10 one step ahead and consider what this hearing that  
11 plaintiff is asking for could possibly --

12 THE COURT: I don't believe that's necessary.  
13 If it's a defect of this kind and he's got standing,  
14 even though -- this is not a class suit, but if it  
15 were, all your arguments would seem to me would fall  
16 flat because it wouldn't depend upon this particular  
17 plaintiff's disability.

18 It would depend upon whether he represented  
19 a great number of others similarly situated and if  
20 he did, maybe he's not a proper representative of the  
21 class but that wouldn't mean that this Court would  
22 ignore the examination of the trust agreement.

23 Now, why don't you go along the way I've  
24 suggested, Mr. Rothfeld and see what you can  
25 establish but if you don't, I will have no alternative.

A-234

# Social Security Award Certificate

Department of Health, Education, and Welfare  
Social Security Administration

Date 11/19/75

Name and Address of Payee as the Claimant  
Or as Representative of the Claimant

Juan Sanchez Lugo  
Calle 4 51  
Arecibo Gdns  
ARECIBO PR 00612

Claim Number 581-24-9522HA

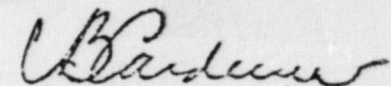
Type of Benefit	Date of Entitlement	Monthly Benefit
DISABILITY	10/75	\$246.80

Amount of First Check: \$ 246.80

It is determined that your period of disability began April 6, 1975. This is the date all facts in your claim, including the medical evidence, show your condition first prevented you from doing substantial gainful work.

Shortly after November 14, 1975, you will receive your first check which will include all benefits due you through October, 1975. After that, a check for \$246.80 will be sent to you each month.

This certifies that you (or the person(s) on whose behalf you applied), became entitled under the Social Security Act to the social insurance benefits shown.



JAMES B. CARDWELL  
COMMISSIONER OF SOCIAL SECURITY

SSA-30 (1-74)

IMPORTANT: See other side for information about your rights and responsibilities ➤



of record 1/28/76  
Wright County Medical School  
all for Appleton